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In the Supreme Court of the United States

OCTOBER TERM 1975

ANTHONY ESPOSITO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner Anthony Esposito, defendant-appellant in the court below, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case.

Opinion Below

The opinion of the Seventh Circuit, not yet officially reported, is set forth in Appendix 1. (App. 1-23.) The opinion and order of the District Court entered on July 12, 1974 is attached as Appendix 2. (App. 24-28.) Pertinent portions of the sentencing hearing on September 16, 1974 are attached as Appendix 3.

Jurisdiction

The opinion and judgment of the Court of Appeals for the Seventh Circuit were entered on August 18, 1975. A timely petition for rehearing was denied on September 16, 1975 and the judgment became final on that date. The Court's orders of August 18 and September 16, 1975 are attached hereto as Appendices 4 and 5. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

The chief government witness against defendant, Charles Crimaldi, postured before the jury as a citizen who had avoided crime and led a law abiding life since he was convicted as a youth many years before this trial. The prosecutors and government agents took the position throughout the trial that Crimaldi was, to their knowledge, a working man with no criminal associations or motive to implicate defendant unfairly. Unbeknownst to defense counsel—but known to the prosecutors and agents—Crimaldi had been engaged in numerous criminal activities during his entire adult life, and had repeatedly and recently been involved in organized and violent but unprosecuted crimes. The prosecutors did not disclose to defense counsel what they knew of Crimaldi's sordid past, and he was presented to the jury in testimony and argument as a long-time solid citizen.

The Court of Appeals held the prosecutors had violated defendant's rights under the Due Process Clause and the Jencks Act, but held the "error" to be harmless.

These facts give rise to the following issues:

1. Does the Court of Appeals' decision conflict with this Court's ruling in *Davis* v. *Alaska,* 415 U.S. 308 (1974), that deprivation of the right of effective cross examination automatically requires a new trial, irrespective of the alleged "harmlessness" of the violation?

2. Does the Court of Appeals' ruling conflict with the holding of this Court in *Chapman* v. *California*, 386 U.S. 18 (1967), and other federal reviewing courts as to the test to be applied in determining whether a new trial should be granted when the defendant's constitutional rights have been violated before or during the trial?

3. Was the government's conduct so flagrant as to call for exercise of this Court's supervisory powers?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions, statutes and court rules involved herein are the Fifth and Sixth Amendments to the United States Constitution, the Jencks Act (18 U.S.C. § 3500) and Rule 2.04 of the Criminal Rules of the United States District Court for the Northern District of Illinois. The texts of the pertinent provisions are reproduced as Appendix 6.

STATEMENT OF THE CASE

On February 25, 1972 a jury found Anthony Esposito guilty of (i) possessing and (ii) distributing 206.5 milligrams of cocaine on June 24, 1971, in violation of 21 U.S.C. § 841. The principal prosecution witness at trial was Charles Crimaldi, a government informer who testified that he had contacted Esposito seeking to purchase cocaine and who claimed to have received a cocaine sample from Esposito on the date in question. The remainder of the government witnesses were special agents of the Bureau of Narcotics and Dangerous Drugs (BNDD) who testified to having conducted surreptitious surveillance of certain of the meetings and conversations between Esposito and Crimaldi. The defendant took the stand on his own behalf, admitted that he had been approached by

Crimaldi, a childhood friend, who was seeking to purchase narcotics, but denied that he had agreed to sell narcotics to Crimaldi and denied that he passed a cocaine sample.

At trial, the prosecution, both in argument and through the testimony of Crimaldi, had led the jury to believe that Crimaldi was a man who had been convicted of armed robbery and burglary at age 17 (in 1950 and 1951) but who had led a law abiding life ever since and who had no motive to lie (Tr. 20, 174-176, 369-370); the prosecution disclosed nothing of Crimaldi's sordid life of crime to the defense or the jury, other than his two youthful convictions. (H. 135-138)*

The defense, in an effort to discredit Crimaldi and to lend credence to defendant's testimony that he had reason to fear Crimaldi and his associates, asked Crimaldi on cross-examination whether it was true that he had been a juice loan enforcer. Crimaldi successfully avoided giving a direct response to the question. (Tr. 105-7) When the same question was addressed to BNDD Agent Haight on cross-examination, Agent Haight testified, contrary to fact, that he was unaware of Crimaldi's juice loan activities.** (Tr. 174-176)

At the conclusion of the trial the District Court arrested judgment on the ground that the prosecution had failed to show a "nexus" with interstate commerce. The gov-

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* References to the record herein are as follows: "Tr. ....." refers to the Transcript of Esposito's trial; "H. ....." refers to the May 21-22, 1974 hearings on Esposito's Motion for New Trial; and "N.T. Ex. ....." refers to the three volume Exhibit to that Motion filed on February 25, 1974.

** During the 1974 hearings on the motion for new trial based on newly discovered evidence, Agent Haight conceded that his trial testimony on the subject was "a little bit in error." (H. 118)

ernment appealed; the Seventh Circuit reversed, *United States* v. *Esposito*, 492 F.2d 6 (7th Cir. 1973), *cert. denied* 414 U.S. 1135 (1974), holding that no such "nexus" need be shown. The merits were not considered on that appeal.

During the pendency of the government's appeal, several of the government witnesses—including Crimaldi, the linchpin of the government's case—testified in other proceedings in a manner violently at odds with their testimony in Esposito's trial. Most significantly, Crimaldi, in an unrelated state court proceeding, testified as a prosecution witness that he had committed murders, conspiracy to murder, battery, hijackings, loan sharking and perjury—all crimes for which he had never been prosecuted; he also admitted in a series of newspaper interviews to having been a professional criminal since age 17 and to having committed murders, armed robberies, burglaries, hijackings, bank robbery, kidnapping, bribery and a number of other crimes. (N.T. Ex. 620-1, 642-7, 651, 656-67, 675, 698, 708-30, 738, 749, 867, 888-94, 936, 938, 951, 973-4, 1133-1167.) These disclosures, coming as they did, to the attention of the defense for the first time *after* the Esposito trial, were the bases of a motion for new trial based on newly discovered evidence.

The hearing on defendant's motion for a new trial revealed that the government's tactic of whitewashing Crimaldi before the jury was not an inadvertent oversight. The prosecution team in the Esposito case had been aware *prior to trial* that Crimaldi had confessed to an appalling catalogue of crimes for which he was never prosecuted. In fact, even prior to the events in issue in this case, Crimaldi had given a four hour tape recorded debriefing to BNDD agents in which he admitted to having engaged in violence as a juice loan enforcer, that he was a robber and a burglar, that he had kidnapped a forest preserve ranger and that he had been involved in bribing police officers

and judges.* (H. 45, 57, 59-70) The government attorney who had participated in the pre-trial discovery phases of the case had listened to the tape recording, had consulted with the debriefing agents prior to trial concerning Crimaldi and his life of crime and had interviewed Crimaldi himself on the subject. (H. 15-18, 20, 28, 76, 112-113, 119-120) The prosecutor who tried the case was briefed by the BNDD concerning the contents of the tape recorded interview of Crimaldi *for the express purpose of being advised of facts which might be brought out on Crimaldi's direct or cross-examination.* (H. 71, 76-79) The very BNDD agents who had obtained the confessions from Crimaldi sat at the prosecution table throughout the trial. *Yet, not a single government attorney or agent disclosed to defendant or his attorney that Charles Crimaldi had confessed to a great many heinous crimes for which he was never prosecuted.*

In fact, the very government agent who less than a year before had conducted a debriefing of Crimaldi on the subject of his juice loan activities, and who immediately before trial had listened to the tape-recorded debriefing, testified under oath at the Esposito trial that he was not aware that Crimaldi had been engaged in *any* illegal activities. (Tr. 174-176; H. 113-120; H. Ex. 1L-1N) The prosecutor compounded the non-disclosure of the impeach-

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* The tape recording is, so far as we know, the fullest summary of Crimaldi's confessed life of unprosecuted crime available to the government before trial. Defense counsel have never been permitted access to the tape or a transcript thereof. The hearings on the motion for new trial also disclosed that the government attorneys and agents prosecuting Esposito had interviewed Crimaldi on other occasions prior to trial concerning his criminal activities. At a minimum, Crimaldi had admitted to the crimes of bribery, hijacking, kidnapping, robbery, burglary, assault, extortion as a juice loan enforcer and conspiracy to murder. (H. 37, 39, 41-2, 52-3, 56-7, 119-120).

ing material concerning Crimaldi by arguing to the jury that Crimaldi had been in jail twenty years before but that there was no charge pending against him now, and that any notion that he was testifying on behalf of the government to get out of his own difficulties was "worthless." (Tr. 369-370.)

The District Court in denying the motion for new trial found that "the government is not blameless in this matter" (App. 28) but held that "it is difficult to believe that the outcome of the trial would have been different if the defendant had been given the tape." (App. 27) The Court was, however, by no means sure of its conclusions in rejecting the new trial motion. As it explained when sentencing Esposito (App. 29):

> "I do not like to put people to the expense of taking an appeal, but I certainly would not try to discourage the defendant from taking one in this case. I think there is a very serious question involved in the prosecutor's actions in this case, as I pointed out in my decision.
>
> "I have even given some thought to changing that decision and letting the Government take the appeal. But I have decided to stand on the decision."

The Court of Appeals, in affirming the conviction, treated the failure to disclose the damning information concerning Crimaldi to defense counsel as a violation of both the Jencks Act (18 U.S.C. § 3500) and the mandate of *Brady* v. *Maryland,* 373 U.S. 83 (1963), but held that the error was "harmless," because in its judgment the Crimaldi admissions "would not have affected the jury's assessment of Crimaldi's credibility" and thus "would not have produced a reasonable doubt in the eyes of the

jury." (App. 15-16) Circuit Judge Swygert in a concurring opinion found that "the Government's thoughtless, cavalier conduct in this case comes to the very brink of requiring reversal", but agreed with the harmless error holding because of his belief that "Crimaldi's credibility was not a crucial factor." (App. 22)

The majority opinion below was predicated, apparently, upon its conclusion that the prosecutor's "failure to reveal the tape was in good faith." (App. 12) That conclusion, even if correct (which we deny—the District Court had pointed out that the existence of the tape "was known to the prosecutors before trial", App. 25), missed the point. It is the *impeaching information* contained in the tape and elsewhere—not the tape recording itself—which is significant. The record is clear that the prosecutors *deliberately* failed to disclose the *impeaching information* to the defense.

REASONS FOR GRANTING THE WRIT

This is a case of first impression on the standard to be applied in determining whether the defendant is entitled to a new trial when the government's deliberate non-disclosure of material evidence deprives him of *both* his Fifth Amendment right to due process and his Sixth Amendment right to confrontation and cross-examination. By deliberately keeping from defense counsel Crimaldi's confessions of a life of unprosecuted crime, the government did more than deny defendant his Fifth Amendment right to due process of law. *Giglio* v. *United States,* 405 U.S. 150, 154 (1972); *DeMarco* v. *United States,* 415 U.S. 449, 450 (1974); *Napue* v. *Illinois,* 360 U.S. 264, 272 (1959); *Brady* v. *Maryland,* 373 U.S. 83, 87 (1963). It also denied him his Sixth Amendment right of confrontation and effective cross-examination. *Davis* v. *Alaska,* 415 U.S. 308, 318 (1974). In *Giglio,* this Court suggested that a new trial is required if the undisclosed evidence "could . . . in any reasonable likelihood have affected the judgment of the jury" (405 U.S. at 154; whereas in *Davis* the Court held that denial of effective cross-examination is " 'constitutional error of the fact magnitude and *no amount of showing of want of prejudice would cure it.*" (415 U.S. at 318) (Emphasis added)

This case is also important for at least three other reasons:

(1) This case represents a significant split between the Seventh Circuit and the opinions of other Courts of Appeal over the standards to be applied when a federal court is confronted with the government's deliberate withholding of impeaching evidence.

(2) The Court of Appeals' opinion adopts a constitutional "harmless error" test which is much less stringent

and at odds with the applicable decisions of this Court, notably *Chapman* v. *California*, 386 U.S. 18, 24 (1967).

(3) The prosecutor's gamesmanship aimed at obtaining a conviction in this case, which has now been sanctioned by the Court of Appeals, is such a radical departure from the standards of fairness and requirements of disclosure mandated by this Court and the Federal Rules of Criminal Procedure as to call for the exercise of this Court's supervisory powers.

I.

THE DECISION OF THE COURT BELOW CONFLICTS WITH THE DECISION OF THIS COURT IN DAVIS v. ALASKA.

If the prosecution had disclosed to defense counsel during trial that its principal witness had confessed to being a juice loan enforcer, kidnapper, hijacker, robber, burglar, briber, and perjurer, but had not been prosecuted for those crimes, the defense would undoubtedly have used that information as the capstone of its cross-examination of Crimaldi. The information would have served not only to discredit Crimaldi's general credibility, it would have shown Crimaldi's bias and motivation to aid the government in order to avoid prosecution himself for his litany of confessed crimes. It would also have shown Crimaldi to be a man fully capable of "planting" the cocaine sample himself in an effort to implicate the defendant. Finally, it might well have shown that Crimaldi had a personal bias against the defendant.*

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* Although we have not been permitted to see the transcript of the tape-recorded interview, the District Court's description of that interview states in pertinent part (App. 26):

> "The defendant is mentioned in the transcript on a few occasions but not in an exculpatory manner."

In all events, the deliberate failure of the prosecution to make this information known denied the defense the opportunity to bring it to the jury's attention. This Court has explicitly held that to deprive defense counsel of the opportunity "to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness" is a denial of the Sixth Amendment "right of effective cross-examination." *Davis* v. *Alaska*, 415 U.S. 308, 318 (1974).

The court below, while conceding the impeaching character of the withheld evidence, found that the jury was "obviously" already suspicious of Crimaldi's credibility (App. 15) and that the additional information would probably not have affected the jury's assessment of his truthfulness. That holding is in direct conflict with this Court's ruling in *Davis* that denial of the right of effective cross-examination is (415 U.S. at 318) " ' "constitutional error of the first magnitude and *no amount of showing of want of prejudice would cure it.*" *Brookhart* v. *Janis*, 384 U.S. 1, 3.' *Smith* v. *Illinois*, 390 U.S. 129, 131 (1968)." (Emphasis added)

If, as we believe is evident, the defendant was denied his Sixth Amendment right to effectively cross-examine his principal accuser, then affirmance of the conviction based upon surmise that defendant was not prejudiced is directly opposed to this Court's recent holding in *Davis*.

II.

THE DECISION BELOW IS IN CONFLICT WITH THE CONSTITUTIONAL HARMLESS ERROR TEST MANDATED BY THIS COURT

Assuming *arguendo* that a harmless error test may properly be invoked in a case such as this, the formulation of

the test applied by the court below is at odds with the decisions of this Court concerning "harmless error."

The government conceded on appeal that the information should have been disclosed, and the court below assumed that the government's failure to disclose the Crimaldi confession violated not only the Jencks Act (18 U.S.C. § 3500) but also the mandate of *Brady* v. *Maryland*, 373 U.S. 83 (1963). Thus, the Court of Appeals assumed that defendant's federal constitutional and statutory rights were violated at trial.

However, in holding that the error was harmless, the court below speculated as to whether the impeachment would "have affected the jury's assessment of Crimaldi's credibility."* (App. 15), and based upon the opinion that the jury's credibility assessment would not have been affected, the court concluded that "it would not have produced a reasonable doubt in the eyes of the jury." (App. 15-16)

That is not the test. This Court has declared that ". . . before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman* v. *California*, 386 U.S. 18, 24 (1967). In view of the trial judge's indecision on whether a new trial would be justified (App. 29) and Circuit Judge Swygert's opinion that the case came to the "brink of reversal" (App. 22), it is clear that the error was not harmless beyond a reasonable doubt.

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* We believe it is improper for an appellate tribunal to even engage in such speculation, cf. *Davis* v. *Alaska*, 415 U.S. 308, 317 (1974), let alone base its decision on the results of that surmise.

III.

THE DECISION BELOW CONFLICTS WITH THE STANDARDS ADOPTED BY OTHER COURTS OF APPEALS TO BE APPLIED IN DETERMINING WHETHER NON-DISCLOSURE OF IMPEACHING EVIDENCE BY THE GOVERNMENT REQUIRES A NEW TRIAL

In *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963), this Court held that "suppression of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

In the present case, the court below has held that where the suppressed evidence has "impeachment value only" defendant is entitled to a new trial only if "its revelation would . . . have produced a reasonable doubt in the eyes of the jury." (App. 15-16) That standard is much less favorable to the aggrieved defendant than the tests prescribed by other Courts of Appeal to be applied to cases which concern suppression of impeaching evidence by the government.

The Fifth Circuit has taken the position that a new trial should be awarded if the undisclosed evidence concerning the principal prosecution witness "would have afforded useful cross-examination." *United States* v. *Deutsch*, 475 F.2d 55, 58 (5th Cir. 1973). That test is clearly met in the present case.

The Second Circuit has developed a more complex standard, which depends upon the culpability of the government in failing to disclose the evidence. *United States* v. *Morell*, —— F.2d ——, 17 Cr.L. 2521 (2d Cir. 1975). In the case of *deliberate* suppression, the defendant is entitled to a new trial when the evidence is material *or* favorable to the defense, and in such a case, materiality is to be judged not

(as was done in the court below) by its predicted effect on the jury verdict, but rather by the effect of suppression on the defense preparation for and conduct of the trial. *United States* v. *Kahn*, 472 F.2d 272, 287 (2d Cir. 1973), cert. denied 411 U.S. 982. In the case of *negligent* non-disclosure, the Second Circuit awards a new trial if there was a significant chance that the added item, developed by skilled counsel, "could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction." *United States* v. *Seijo*, 514 F.2d 1357, 1364 (2d Cir. 1975); *United States* v. *Pacelli*, 491 F.2d 1108, 1119 (2d Cir. 1974), cert. denied 419 U.S. 826; *United States* v. *Miller*, 411 F.2d 825, 832-3 (2d Cir. 1969).*

In trying to assess the impact that revelation of Crimaldi's life of crime would have had on the jury, the court below considered it significant that Crimaldi had been impeached in other ways (App. 14). The Second Circuit has specifically held that even when the defense possesses and exploits an "abundance of impeaching material" a new trial should be awarded where the government fails to disclose other "forceful impeaching material bearing on the credibility of the government's key witness." *United States* v. *Pacelli*, 491 F.2d 1108, 1119 (2d Cir. 1974), cert. denied 419 U.S. 826; *United States* v. *Seijo*, 514 F.2d 1357, 1364 (2d Cir. 1975).

We submit that these conflicting views on such an important and recurring question as the standard to be applied to cases of governmental non-disclosure of impeaching evidence compel prompt resolution by this Court.

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* The essential difference between the Second Circuit's negligent non-disclosure test and that adopted by the Court below is that the Second Circuit would award a new trial if revelation of the evidence would produce a significant chance of a hung jury, *United States* v. *Miller*, 411 F.2d 825, 832 n. 14 (2d Cir. 1969), whereas the Seventh Circuit requires a showing that the new evidence would result in acquittal.

BLEED THROUGH

IV.

THE CONDUCT OF THE GOVERNMENT IN THIS CASE WAS SO FLAGRANT THAT THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWERS AND AWARD A NEW TRIAL

Both the District Court and Judge Swygert in his concurring opinion in the Court of Appeals, expressed dismay at the tactics of the government in this case. The trial judge in his opinion found that the government was not "blameless" (App. 28), and later expressed the view that there was "a very serious question in the prosecutor's actions in this case" so that he had considered granting a new trial. (App. 29) Judge Swygert wrote that the government's "cavalier conduct" brought the case to the "very brink" of reversal. (App. 22) Yet both courts let the conviction stand.

Trial by trick is not the American way of doing things; however, that is what has been sanctioned here. Every member of the prosecution team, from the lawyer who participated in the pre-trial discovery phase to the trial lawyer, as well as the BNDD agents who testified on behalf of the government and who were seated at counsel table throughout the trial, was aware that Crimaldi was a professional criminal and that he had confessed to a horrible litany of crimes for which he was never prosecuted.

Yet they chose not to share this information with the defense. In fact, when Crimaldi testified that he had been convicted of two crimes while a youth but falsely pretended that for the past 15 years he had been employed as an honest plumber, the government sat silent. When defense counsel attempted to cross-examine Crimaldi on whether he had been a juice loan enforcer, Crimaldi dis-

ingenuously avoided answering the question, and the government sat silent. When Agent Haight untruthfully denied on cross-examination that he was aware of Crimaldi's juice loan activities, the prosecutors sat silent.

When it came time to argue the case to the jury, the prosecutor painted Crimaldi as a reformed youthful offender who had for a number of years been an honest plumber, who was subject to no current charges, and who had no motive other than disinterested altruism for testifying against defendant, his childhood friend.

We know that there is no litmus paper test to determine whether disclosure of the whole truth may have changed the jury's verdict. We cannot show objectively that it would have, and the government cannot show that it would not have, because the prosecutors decided not to disclose the explosive information they had about Crimaldi, because Crimaldi was not candid, and because the agents lied concerning their knowledge of Crimaldi.

We believe that if the truth about Crimaldi had come out, there is a great likelihood that the jury would have believed Esposito and not Crimaldi. Surely, the facts would have afforded defense counsel powerful additional arguments, and the jury would have had a far different record to consider in its deliberations—a record which weighed much more heavily in the defendant's favor than that which the jury had before it.

This Court has in the past reversed convictions for prosecutorial derelictions under facts far less compelling than those presented here. We submit that this is an appropriate case for exercise of this Court's power of supervision.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that this Court grant a writ of certiorari to review the judgment of the Seventh Circuit in this case.

Respectfully submitted,

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